No. 12173

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRVING L. BURSTEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This appeal is from a judgment of conviction of the offense of mailing obscene matter on four counts, in violation of Title 18, United States Code, Section 334, said judgment having been entered by the United States District Court for the Southern District of California, at Los Angeles, California, on June 8, 1948. [Clk. Tr. 23.]

The defendant, and appellant herein, Irving L. Burstein, also known as Edward Reyer, Frank Miller and George H. Lane, was charged by indictment in Count One with having deposited for mailing, on or about April 22, 1947, in the United States Post Office in Los Angeles County, California, a book entitled "Confessions of a Prostitute" for delivery to H. Abbott, 1424 N. Gardner, Hollywood, California, said book being obscene, lewd, lascivious and filthy. [Clk. Tr. 2.]

In Count Two of said indictment, the defendant was charged with having deposited in the United States mails on or about April 10, 1947, a letter for delivery to P. Campeau, Los Angeles, California, said letter being entitled "Unusual Publications," and which disclosed information as to where, how and for how much a certain book "Confessions of a Prostitute" could be obtained, said book being obscene, lewd, lascivious and filthy. [Clk. Tr. 4 and 5.]

Counts Three and Four charged similar offenses to that charged in Count Two except that letter was mailed to R. MacFarland, San Fernando, California, on or about April 19, 1947 [Count Three, Clk. Tr. 6], and the letter in Count Four was mailed to E. N. Caldwell, Los Angeles, California, on or about April 22, 1947. [Clk. Tr. 7.]

A verdict of guilty as charged was returned by the jury on all four counts on May 20, 1948. [Clk. Tr. 21.]

It was further adjudged, on June 8, 1948, that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year and one day on Count One, and like sentences were imposed on Counts Two, Three and Four, but the sentences on all four counts to run concurrently. It was further ordered that said concurrent sentences begin and run at the conclusion of the defendant's sentence in the United States Penitentiary, at Atlanta, Georgia. [Clk. Tr. 23 and 24.]

A Notice of Appeal from the above entitled judgment was filed by the defendant, and appellant herein, on June 17, 1948 [Clk. Tr. 25 and 26] to this Court which has appellate jurisdiction under Title 28, U. S. C. A., Sections

1291 and 1294(a). The United States District Court had jurisdiction under Title 28, U. S. Code, Sec. 41(2), and Sec. 3231 of Title 18, New U. S. Code; also, venue was in U. S. District Court for Southern District of California under Rule 18 of Federal Rules of Criminal Procedure.

Statement of the Case.

The Facts.

Since no statement of the facts has been set forth in Appellant's Opening Brief, the following summary of evidence pertinent to the questions before this Court is hereby submitted.

The appellant whose true name is Irving L. Burstein, as disclosed by him upon arraignment April 26, 1948, in the United States District Court for the Southern District of California [Clk. Tr. 9] resided in Los Angeles, California, during the month of April, 1947. In this period the publication called "Confessions of a Prostitute," together with three letters, were mailed to four separate parties who were in the vicinity of Los Angeles, California.

The book in question (Count One), "Confessions of a Prostitute," was mailed to H. Abbott, Hollywood, California, April 22, 1947. [Clk. Tr. 14, and Pltf. Ex. 1.] Defendant stipulated that he actually mailed said book, and left open to the jury the question of its obscenity.

The letters mailed to P. Campeau in Hollywood, California (Count Two), R. MacFarland, San Fernando, California (Count Three), and to E. N. Caldwell, Los Angeles, California (Count Four) were similar in their build-up and solicitation for the purchase of the book

"Confessions Of A Prostitute" and defendant's offer to mail it to them for the price of Five Dollars ($5.00). In the first letter he signed his name as Frank Miller, 7904 Santa Monica Boulevard, Los Angeles, California [Pltf. Ex. 4], and in the latter two as George H. Lane, 633 South La Brea Avenue, Los Angeles, California [Pltf. Exs. 3 and 5].

Defendant stipulated with counsel for the Government that all names alleged in the indictment were, and are, the names used by him under which he, the defendant, operated and conducted his business, also that his true, full and correct name is Irving Burstein. [Clk. Tr. 14 and 15.]

In each of the three letters referred to above captioned "Unusual Publications," the defendant began with "Dear Friend," then went on to say he had a book to sell to mature and broad-minded men, but that it must not fall into the wrong hands. Thereupon, certain lines were quoted from the book in all three letters, to-wit:

> "'He went crazy when he saw my legs. He said they were perfect, he kept kissing them and running his hands over them. I knew he wasn't so young and had to get a thrill up. * * * He dumped me on the bed and almost killed me, he got right on top of me, I couldn't breathe hardly.' So, if you are a proper person for this type of literature, enclose a Five dollar bill with this letter, mail it in the enclosed envelope, and your copy will be dispatched promptly." [Pltf. Exs. 3, 4 and 5.]

Defendant was first indicted April 30, 1947. [Clk. Tr. 7.] The cause came on the calendar for arraignment and plea in the United States District Court, Southern District of California, on May 12, 1947. The case

was called and defendant did not respond, after which his bond was ordered forfeited; an alias bench warrant issued, and a new bond fixed in the amount of $15,000.00. [Clk. Tr. 8.]

Defendant testified as his own witness and at his own request that he was taken before the United States Commissioner here who set bond, and after he was released on bond he went away, "very foolishly," and returned to New York. [Rep. Tr. 75.]

He testified further that he and his brother were arrested in New York in September 1940 on the same type of offense on which he was being tried here. He got out on bond and ran away by coming to California. [Rep. Tr. 70-74.]

He testified further that he had a prior conviction in 1940 in Atlanta, Georgia, for possession of a car which had been taken across a state line illegally. He was given a three year sentence after a plea of guilty. [Rep. Tr. 68.]

On or about July 21, 1947, the defendant was sentenced by the United States District Court for the Eastern District of New York to serve three years' imprisonment upon a similar charge. (Pltf. Op. Br. p. 1.)

On January 18, 1948, defendant requested Mr. Ray Kinnison, Assistant U. S. Attorney, Los Angeles, California, to arrange to have him removed to Los Angeles at once for trial on the indictment here in question. [Deft. Ex. H; Clk. Tr. 50.]

A Writ of Habeas Corpus *ad Prosequendum* was issued March 16, 1948, returnable April 26, 1948, as to the defendant by the United States District Court, Los Angeles, California. [Clk. Tr. 57.]

The defendant was arraigned in said Court April 26, 1948, was asked by the Court if he had counsel to represent him, to which he replied, "No, Sir; I don't. I would like to take care of it myself, with the Court's permission." [Rep. Tr. 2.]

The Clerk then informed defendant he was entitled to a trial by jury, and to be represented by an attorney, and if he did not have funds with which to employ an attorney, the court would appoint one for him, without charge. [Rep. Tr. 3.]

The Clerk asked defendant if he had funds with which to employ an attorney and he replied he did not. Again the Clerk inquired, "Do you desire an attorney, for the court to employ one for you without cost to you?" Again the defendant replied, "No Sir." [Rep. Tr. 3.]

At this point the Court said it thought it would be better that defendant have an attorney to represent him on this charge, and appointed Mr. George M. Wiener, who is a member of the California Bar. [Rep. Tr. 21.] A continuance was granted until April 28, 1948, at which time a plea of not guilty was entered as to all four counts, and the case set for trial for May 18, 1948.

On April 30, 1948, Attorney Wiener's Motion to Withdraw from the case was granted and he was discharged

except when needed by the Court. The defendant consented and waived the right to counsel. [Clk. Tr. 11.]

On May 18, 1948, defendant for the first time after a jury was called, but not impanelled, informed the Court he was not ready for trial and moved for a continuance, which was denied. [Clk. Tr. 12.]

After the Government rested, the defendant called as his first witness, Mr. George M. Wiener, the attorney who had been relieved as his counsel. In a statement to the Court before the witness testified, defendant said:

> "I would like to tell your Honor and the jury that Mr. Wiener was appointed by Judge Beaumont to aid as my counsel, and we couldn't agree on the method of defense, and I asked the Judge to relieve Mr. Wiener of his obligation; and that was done. Now Mr. Wiener was very nice about offering to help in any way he could. I asked him to buy a copy of the book, of the original book this case is about." [Rep. Tr. 21, 22, and Deft. Ex. A—"Sterile Sun" by Caroline Slade.]

Following his testimony, Mr. Wiener again consented to sit in with defendant to assist him in the case at the request of the trial court. [Rep. Tr. 26.] During a recess, and in the absence of the jury, a conference was held in the Judge's Chambers, wherein defendant reaffirmed his position to proceed with his own defense and Mr. Wiener clarified his position, and agreed to assist Burstein in any way possible. It was clear their theories of defense differed, and again defendant stated he didn't

think he should take up any more of his (Wiener's) time because he was not in a position to pay him. [Rep. Tr. 31, lines 11 and 12.] The Court explained what high calibre of men were recommended, endorsed and presented to the Federal Court by the Bar Association[1] and that pay was not an element here. [See Rep. Tr. 27 to 35, incl., for said proceedings in Chambers.]

The said defendant thereupon continued to try his own case *in propria persona*. He requested the Court to have two witnesses subpoenaed, which was done with assistance of Government counsel. [Rep. Tr. 36.]

After a verdict of guilty, and Notice of Appeal was filed, defendant proceeded *in forma pauperis* to perfect his appeal, having made an affidavit, reciting "That because of my poverty, I am unable to pay the costs of said suit or action or appeal or to give security for the same." [Clk. Tr. 27.]

At no time or place in the record did the defendant disclose possession of funds anywhere with which to employ counsel of his own choosing. He did not seek the process of the Court to obtain any funds whatsoever, if he had same. Never did he ask that other counsel be appointed to replace Mr. George M. Wiener, nor did he ever express a desire to obtain another attorney.

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[1]Mr. George M. Wiener was serving on the Los Angeles Bar Association Committee in Federal Court during the week defendant Burstein was arraigned, and was appointed.

Questions Involved.

I. Whether or not defendant was denied a speedy trial as guaranteed by the Sixth Amendment to the Constitution?

A. Whether a defendant who is a fugitive from justice at the time of arraignment has any standing to complain of denial of a speedy trial?

B. Whether a defendant is precluded from asserting his right to a speedy trial by his own actions or conduct?

C. Whether it was reversible error to deny defendant's motion for a continuance at the time of trial?

II. Whether or not defendant was denied the right to counsel as guaranteed by the Sixth Amendment to the Constitution?

A. Whether or not defendant waived his personal right to counsel in this case?

ARGUMENT.

Summary.

The appellant in this case bases his appeal primarily upon the premise that he was denied a speedy trial as guaranteed by the Sixth Amendment to the Constitution; second, that he was denied the assistance of counsel as guaranteed by the Sixth Amendment, and third, that the court committed an error in denying his continuance at the time of trial, at which time the appellant states now he was denied the use of his funds for the purpose of obtaining the services of an attorney of his choice, and therefore, was forced to trial without there being witnesses available in his behalf. In the review of the record in this case, the following salient facts stand out in bold relief. First, the appellant was indicted for this offense in the Southern District of California by the grand jury on April 30, 1947. The appellant appeared before the United States Commissioner, he has testified in his own behalf and was released after he posted bond. According to his own testimony at the trial, he very foolishly left the jurisdiction and returned to New York. At the time of arraignment on May 12, 1947, the appellant did not appear. His bond was forfeited, and a new bail was set at $15,000, and a bench warrant issued by the District Court.

In the course of the appellant's testimony it must be observed that he admitted a similar offense in the State of New York in 1940, at which time he was arrested with his brother, and again he admitted on the witness stand that he did a very foolish thing, that is, by running away and coming to California, after posting bond. He further admitted a prior conviction in Atlanta, Georgia, in 1940,

for the possession of an automobile which had been illegally transported across a state line, and after a plea of guilty he was sentenced to three years' imprisonment.

The record further discloses that on July 21, 1947, this appellant was sentenced in the Eastern District of New York to serve three years' imprisonment. After conviction on a similar charge to the one on which he was tried in the present case, he was imprisoned in the Federal Penitentiary at Atlanta, Georgia, during which time he had considerable correspondence with the attorney for the bonding company in Los Angeles, namely, Mr. Thomas B. Sawyer. Letters between the appellant and Mr. Sawyer were introduced in evidence by appellant, and the discussion related mainly to a plea by appellant in another district court under Rule 20 of the Federal Rules of Criminal Procedure. The discussions disclosed the predicament of the surety company which desired to have the forfeiture of appellant's bond set aside.

The record further discloses correspondence between the appellant and Mr. Ray Kinnison, Assistant United States Attorney in Los Angeles, relative to having appellant's case disposed of at an early date. The United States Attorney for the district in which Atlanta, Georgia is situated, did not consent to a disposition of the case under Rule 20, and whatever consent had previously been indicated on the part of he United States Attorney for the Southern District of California was withdrawn. However, the correspondence from appellant to the latter office of the United States Attorney was dated in January, 1948. A writ of habeas corpus *ad prosequendum* was issued by the District Court here on March 16, 1948, returnable on April 26, 1948.

On the date of April 26, 1948, appellant was present for his arraignment, and stated that he did not desire counsel after the clerk informed him that he was entitled to an attorney of his own choosing at all stages of the proceedings. The clerk further told him that if he did not have funds with which to hire counsel, the court would appoint one for him, and he again stated that he had no funds, and further wanted to represent himself with the court's permission. He was advised by the court to accept the service of counsel, and consequently, Mr. George W. Wiener was appointed to represent him. This attorney was a member of the Los Angeles Bar Committee, who was present in court at the time of appellant's arraignment. Mr. Wiener had been a member of the California Bar since 1943, and the trial court explained to the appellant during a proceedings in chambers while the trial was in progress, that the Bar Association recommends and endorses to the Federal court outstanding attorneys to assist in the defense of those who have no funds with which to engage their own counsel.

After some disagreement on the theories of defense, this attorney asked the court to be relieved as appellant's counsel, to which the latter consented, and at no time did he request the court to appoint other counsel to replace Mr. Wiener. In a statement to the court and the jury during trial appellant stated that after said disagreement on the theories of defense, he himself has asked the court to relieve Mr. Wiener in order that he might conduct his own trial.

In the matter of funds, it must be noted in appellant's opening brief that he complains that he was denied access to private funds with which he could have engaged coun-

sel of his own choosing. This point is raised for the first time upon appeal, and at no time does the record disclose any mentioned of private funds or the need for the process of the court in obtaining same. Furthermore, it must be noted that appellant executed an affidavit on the 29th of October, 1948, in which he recites "that because of my poverty I am unable to pay the costs of said suit or action or appeal or to give security for the same." Pursuant to an order of the District Court, appellant was thereafter allowed to perfect his appeal *in forma pauperis.*

The case decisions herein reviewed or cited apparently hold without exception that the constitutional guaranty of assistance to counsel is a personal right that may be waived, provided the defendant does so intelligently and with the full understanding of his rights. As one District Court stated, a defendant is entitled to the appointment of counsel but the court is not bound to force counsel upon him. It is submitted that the record is packed in this case with evidence that appellant waived his right to counsel, and that he fully understood his rights in so doing. That he competently waived his right, and did so intelligently was a question for the trial court to decide, but in review it must be noted that appellant conducted his own trial, and was competent enough to prepare an appellate brief on his own behalf.

In the matter of a denial of a speedy trial, the decisions hold that one who is a fugitive from justice has no standing to question that he was denied a speedy trial. A further point is abundantly clear from the cases that one is precluded from asserting his denial of a speedy trial where by his own actions or conduct he has contributed to the delay. Examples of this are found in acquiescence to a long period of delay, as much as seven years in one

case, five years eight months in another, and lesser periods of time as indicated by decisions cited. The courts seem to hold that it is not the period of time alone that controls, but a question of demanding trial on the part of the appellant. A further refinement of the rule holds that a demand for trial must be made to the court of the district in which the indictment is pending, and if this motion for speedy trial is denied, and second remedy is open, that of a petition to the proper appellate court for a writ of mandamus. None of these things were done by the appellant in the present case. Therefore, it is submitted that by his own actions and by his becoming a fugitive from justice at the time of his arraignment in this district, he waived any rights he might have had and has no standing to complain thereof. It is immaterial that another jurisdiction took appellant into its custody, tried him and imposed the sentence which he was serving at the time he was returned to this district by a writ of habeas corpus *ad prosequendum* following his own request by letter to the Office of the United States Attorney here.

A third point is raised by appellant, namely, that the court committed error in denying his motion for a continuance at the date of trial. He recites in his brief that he had not been able to have witnesses available for his defense, and further, that the authorities in charge of the jail where he was in custody denied him the access to private funds with which to engage counsel. The record discloses that all of the witnesses requested by appellant were subpoenaed with the assistance of government counsel, and no other witnesses were requested after those whom he called had testified. Furthermore, the court explained to appellant in the course of trial that it was going a long ways in allowing him to offer evidence which otherwise might be hearsay or not material. An example

is given of the original book which was received in evidence over Government's objection from which appellant claimed he had extracted the parts which made up the publication entitled "Confessions of a Prostitute." The evidence did not show whether or not the original book entitled "Sterile Sun" was ever transported through the United States mails. This book was introduced as being a publication from a restricted list in the Los Angeles Public Library, said list being available only to ministers, attorneys, and social workers, or people of that class.

It must be pointed out further that appellant stipulated that he mailed the publication in question "Confessions of a Prostitute" as charged in the indictment, also that he mailed the three letters set forth in the three remaining counts to the persons as charged, and that he used the fictitious names other than his own true name in these transactions. Thus, his only defense was the question of obscenity of these publications, which was submitted to the jury, and on this point the jury has spoken in the affirmative.

It is submitted that no reversible error was committed by the trial court in the denial of said continuance. Every possible effort was made to accord the appellant a fair trial, and it is difficult to see how the result would have been different because of mere delay, since the jury had only one issue to determine regardless of the date of the trial. It must be observed that appellant had twenty days' notice between the time of arraignment and time of trial within which to prepare his case, and during which time he might have had the assistance of counsel had he not waived such rights. Upon appeal he now assumes two inconsistent positions; first, that he was denied a speedy trial; and second, that he was denied a continuance.

It is submitted that any delay in having his case disposed of was caused by his own actions or misconduct in becoming a fugitive from this jurisdiction, and that his right to counsel was fully preserved by the court, but that such right was waived in an intelligent and competent manner. The judgment should be affirmed.

POINT I.

The Appellant Was Not Denied His Right to a Speedy Trial as Guaranteed by the Sixth Amendment to the Constitution.

A. One Who Became a Fugitive From Justice From the Jurisdiction Which First Obtained Custody and Was Later Apprehended, Tried and Sentenced in Another District Is in No Position to Complain of Delay in Receiving a Speedy Trial in the District of Origin.

It was held in the case of *Hart v. United States* (C. C. A. 6, 1910), 183 Fed. 368 at 370 that where the defendant, in anticipation of his prosecution, escaped the vigilance of the marshal and was a fugitive from justice until a short time before he was put on trial, he could not be heard to say that he was denied the constitutional right to a speedy trial. (Writ of Certiorari Denied in 1911, 220 U. S. 609, 55 L. Ed. 608, 31 S. Ct. 714.)

In the case of *Shepherd v. United States* (C. C. A. 8, 1947), 163 F. 2d 974, that where delays have been caused by the accused himself they cannot be complained of by him. The right of the accused to a discharge for failure of the prosecution to give him a speedy trial is a personal one to him and may be waived. Where an accused becomes a fugitive from justice, he cannot demand a dis-

charge for the delay when the delay is the result of his own conduct. (Cases cited by the Court are as follows: *Phillips v. United States,* 8 Cir., 201 F. 259; *Pietch v. United States,* 10 Cir., 110 F. 2d 817, 129 A. L. R. 563; *State v. Swain,* 147 Or. 207, 31 P. 2d 745, 32 P. 2d 773, 93 A. L. R. 921.)

In the *Shepherd* case above, the defendant was arrested in 1943, was given a hearing before a United States Commissioner and was held for trial under a $2,000 bond. He wrote a letter to the United States Attorney requesting trial. Up to that time no indictment had been returned against the defendant. He was released on bond, and the grand jury returned an indictment in 1944 after which the case was subject to trial, and notice sent by the United States Attorney to the surety directing him to produce the defendant for trial. The bondsman, however, was unable to produce the defendant. Following release on bond defendant went to another state, embarked on various ships in the Maritime Service, and was later court martialed for deserting an American ship in 1944. He was returned to the United States where he entered a plea of guilty in the United States District Court of another state, and was sentenced to three years on each count, the sentences to run concurrently. While a prisoner at Leavenworth Penitentiary in 1945, a writ of habeas corpus *ad prosequendum* was issued by the District Court directing that the defendant be taken from the penitentiary for trial on the first charge. No motion for dismissal was made of the indictment, but defendant entered a plea of guilty to each of two counts of the indictment returned by grand jury 1944. He filed an appeal, asserting that he had been denied the right of a speedy trial.

In reviewing this contention the Court stated that an accused has two remedies if he deems that he is not being given a speedy trial. His first remedy is to make a demand by a motion to the Court for such trial, and not by a motion to dismiss indictment on account of the delay. If a motion for trial should be denied, his further remedy would be to apply to an Appellate Court for writ of mandamus to compel trial.

In *Phillips v. United States, supra,* the court, speaking through the late Judge Carland, in referring to this question of procedure said [201 Fed. 262],

> "Counsel for Phillips also moved the court to dismiss the case and discharge the defendant, because the United States had failed to bring him to trial at an earlier date. This motion was also overruled. The sixth amendment to the Constitution of the United States provides that the accused shall enjoy the right to a speedy and public trial; but the record does not show that Phillips ever asked for a trial during the four years that the indictment was pending, and we do not think a defendant can acquiesce in the postponement of his trial, and then, when the same is called, move that the case be dismissed because he had not been given a speedy trial. It is his duty, if he wants a speedy trial, to ask for it; and we must presume that he would have been granted an earlier trial if he had so asked. There was no error in the ruling of the court in this respect."

In *Pietch v. United States, supra,* defendant was tried more than seven years after the termination of the transaction on which the indictment was predicated. The court, observing that defendant did not object nor protest to the

court respecting the delay, said (110 F. 2d 819, 129 A. L. R. 563):

> "He filed a motion to dismiss the indictment on account of the delay, but the motion was filed more than three years after the return of the indictment, and it was a motion to dismiss—not a demand for trial. A person charged with a crime cannot assert with success that his right to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States has been invaded unless he asked for a trial. In the absence of an affirmative request or demand for trial *made to the court,* it must be presumed that appellant acquiesced in the delay and therefore cannot complain." (Emphasis supplied.)

In *Frankel v. Woodrough,* 8 Cir., 7 F. 2d 796, 798, the defendant was in the penitentiary serving a sentence. During the time he was so imprisoned he filed a motion demanding trial under the pending indictment against him. This demand having been refused, application for writ of mandamus was made to the court which sustained the application, thus indicating the proper procedure.

In discussing this problem the Court in the *Shepherd* case, *supra*, at page 978, had this further to say:

> "Even if defendant might properly urge this question by motion to dismiss the indictment, such motion could not, in view of the undisputed facts, be sustained. At the first term of court at which defendant could have been tried he was absent from the jurisdiction of the court, a fugitive from justice, and remained absent until he was brought into the jurisdiction by writ of habeas corpus *ad prosequendum.* The right of a speedy trial is relative. It is not inconsistent with delays but depends upon circumstances

> and here the delay is satisfactorily explained by the government. Defendant was brought to trial as soon as was reasonably possible and as said in Frankel v. Woodrough, *supra.* '* * * we think an accused would not be entitled to a discharge even though he were denied a speedy trial within the meaning of the Constitution."

The Federal rule and the California rule appears to be the same on the question of whether or not the defendant can avail himself of the Constitutional guarantee of a speedy trial where he is a fugitive from justice. In the case of *In re Gere,* 64 Cal. App. 418 (1923), the Court had this to say:

> "It is conceded that the constitutional guaranty of a speedy trial and the provisions of section 1382 of the Penal Code adopted in pursuance thereof do not operate in favor of a fugitive from justice. It must also be true that the law on this subject should not be permitted to work to the advantage of one whose arrest has been delayed because of his own wrong. In other words, one whose dissimulation, falsity, and deceit have been a contributory factor in the delay in the matter of his apprehension is in no position to complain that he was not arrested and his case not brought to trial within sixty days after the filing of the indictment or information. In such a case the constitutional and statutory right to a speedy trial would be available to him only after he had been taken into custody and the court had acquired jurisdiction to proceed with the trial."

B. One Whose Own Action Delays Trial on a Criminal Charge Is Precluded From Invoking His Right Under This Amendment to a Speedy Trial.

It has been held in the case of *Daniels v. United States* (C. C. A. 9, 1927), 17 F. 2d 339, that five years is not a period of time sufficient to constitute a denial of the constitutional guarantee for a speedy trial. On page 344, this court had the following to say:

> "No statute of the United States defines the time within which criminal accusations must be tried. In the absence of such a statute, it would seem that, if the accused fails in his efforts to bring the case on for trial, his only remedy would be to apply to an appellate court for mandamus. It has been so held. Frankel v. Woodrough (C. C. A.), 7 F. 2d 796. It is also held that one may not acquiesce in the postponement of his trial from time to time, and then insist on dismissal because he has been denied a speedy trial. Phillips v. United States (C. C. A.), 201 F. 259; Worthington v. United States (C. C. A.), 1 F. (2d) 154, certiorari denied 266 U. S. 626, 45 S. Ct. 125, 69 L. Ed. 475. Here the indictment was returned November 12, 1920, and the trial was had October 6, 1925. A demurrer was filed on December 11, 1920, and was submitted on February 11, 1922. It is not shown that at any time between the indictment and the trial effort was made by the defendant to expedite the case or to bring it on for hearing. We find nothing contrary to these views in Beavers v. Haubert, 198 U. S. 77, 25 S. Ct. 573, 49 L. Ed. 950."

The *Daniels* case was cited with approval in *Pietch v. United States,* 110 F. 2d 817 on page 819, which case held that a defendant tried seven years after the transactions on which the indictment was passed was not an excessive period of time so as to constitute a denial of the right to a speedy trial. In that case the appellant by his own action or failure to act was precluded for the reason that he had not asked for a trial nor had he made a demand to the proper court, and thereby was presumed to have acquiesced in the delay, and therefore, could not complain thereof.

Again, the *Daniels* case was cited with approval in the case of *United States ex rel Hanson v. Ragen, Warden,* (C. C. A. 7, 1948), 166 F. 2d, page 608. In this case it was a question of a right to a speedy trial as guaranteed by both the United States Constitution and the State Constitution. The State's statute provided that an accused should be brought to trial within a certain time similar to the California statute referred to in the case *In re Gere, supra.* The Court said that under Federal case law the right to a speedy trial is relative and dependent upon surrounding circumstances, citing *Beavers v. Haubert,* 198 U. S. 77, 87, 25 S. Ct. 573, 49 L. Ed. 950. Further, it said if the petitioner's own action delays a trial he is precluded from invoking this right, citing*Daniels v. United States, supra.*

In the Supreme Court decision of *Beavers v. Haubert, supra,* the court lays down the general rule on page 86 of its decision as follows:

> "undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. This is the injunction of the

Constitution, but suppose he is charged with more than one crime, to which does the right attach? He may be guilty of none of them, he may be guilty of all. He cannot be tried for all at the same time, and his rights must be considered with regard to the practical administration of justice. To what offense does the right of the defendant attach? To that which was first charged, or to that which was first committed? Or may the degree of the crimes be considered? Appellant seems to contend that the right attaches and becomes fixed to the first accusation, and whatever be the demands of public justice they must wait. We do not think the right is so unqualified and absolute. If it is of that character it determines the order of trial of indictments in the same court. * * * It must be remembered that the right is a constitutional one, and if it has any application to the order of trials of different indictments it must relate to the time of trial, not to the place of trial. The place of trial depends upon other considerations. It must be in the district where the crime was committed. There is no other injunction or condition, and it cannot be complicated by rights having no connection with it. The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest—means of bringing a defendant to trial."

C. Denial of Appellant's Motion for a Continuance at the Date of Trial Was Not Reversible Error.

Where, a defendant states upon his arraignment that he desires no counsel, but the Court appoints competent counsel to assist him anyway, and they disagree as to the theory of trial, counsel is dismissed, and the trial is set twenty days later, defendant after such notice may not complain upon appeal that he was prejudiced when the Court denied his motion for a continuance, and has all witnesses requested by defendant subpoenaed into Court.

In the absence of a showing that a further delay would better enable him to prepare a defense, or in what regard he was prejudiced a defendant has no standing to complain on the one hand that he was not accorded a speedy trial, and on the other, that he was not granted a continuance after the date had been set for weeks, a jury called, and the Court ready to hear his case.

In the case of *Danziger v. United States* (C. C. A. 9, 1947), 161 F. 2d 299, at page 301, this Court held that it was not reversible error for the Court to deny Danziger's motion for continuance to get depositions from England and other distant places, where the motion was made and denied but not renewed, and it was not clear that said depositions would have been material, or could have affected the result.

Where, as here, the trial court issued subpoenas for all witnesses requested by defendant, admitted hearsay evidence on behalf of defendant, and obtained further assistance of counsel for defendant, it cannot be urged that error was committed without a showing that a different or more favorable result would have followed from a continuance. Where defendant stipulated that he did in fact mail the publications in question and used the fictitious

names in his correspondence, and left the sole issue of the obscenity to the jury, how can he be heard to say the jury would have reached a different verdict at same later date because of mere delay?

In the *Danziger* case the Court again affirmed the rule that the constitutional guaranty of a speedy trial is a personal right which may be waived by a failure to assert it, citing *Collins v. United States,* 9 Cir., 157 F. 2d 409.

In this latter case, two years was held to be no denial of the constitutional guaranty to a speedy trial, since it is a personal right which is waived by failure of accused to demand trial. It is submitted that a motion for continuance by defendant here on the date of trial was a waiver of any right to a speedy trial he may have previously claimed, and that he lost same by assuming two inconsistent positions at the same time. The *Collins* case also cites the *Daniels* case, *supra,* with approval, as well as the *Pietch* case, above discussed.

In *Bayless v. United States* (C. C. A. 8, 1945), 147 F. 2d 169, it was held that trial five years and eight months after indictment did not constitute a denial of the right to speedy trial where defendant by his own action, entered a plea of guilty, was sentenced, and later released from Alcatraz upon a writ of habeas corpus, not having had assistance of counsel, and was thereafter promptly brought to trial on the original indictment. The Court said it is not the law that the mere lapse of such period of time between the commission of a crime and trial of indictment therefor establishes denial of a speedy trial within the intendment of the sixth constitutional amendment.

The point has been urged by the appellant that he made various attempts through correspondence with Attorney Sawyer and with the United States Attorney's Office in Los Angeles to have his case brought to trial at an early date. The record discloses that the United States Attorney in the District of Georgia did not consent to handle his plea under Rule 20, and subsequently, the consent of the United States Attorney for the Southern District of California consent was withdrawn. It must be observed that Rule 20 of the Federal rules of criminal procedure provides that a defendant arrested in a district other than that in which the indictment is pending may state in writing after receiving a copy of the indictment that he wishes to plead guilty or *nolo contendere,* and to waive trial in the district in which the indictment is pending, and consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States Attorney for each district. Therefore, it follows that if consent of the United States Attorney for either district is not given there is no other alternative provided by Federal rules than to remove said defendant to the district of origin to either plead or stand trial. Furthermore, it must be observed that a plea of guilty or *nolo contendere* are the only pleas provided for in a foreign district under Rule 20. While it is not clear from the record what plea the defendant desired to enter in either the District of Georgia or the Southern District of New York, yet it is difficult to see with what conviction he urges this point now when in retrospect he entered a plea of not guilty

after being removed to the Southern District of California and insisted upon trial for the alleged offense.

In the case of *Fowler v. Hunter, Warden* (C. C. A. 10, 1947), 164 F. 2d 668, it was pointed out, as in other cases above cited, that an accused waives his right to discharge or to a dismissal of a prosecution by reason of the delays in bringing him to trial if he does not make a proper application therefor. The demand for trial must be addressed to the court in which the indictment is pending (and not to the United States Attorney or some third party attorney). Moreover, it has been held that an application for a writ of habeas corpus does not seek a trial, but that the remedy of a person charged with a crime who is not accorded a speedy trial, is to demand trial, and if the demand is not met, to apply to the proper appellate court for a writ of mandamus to compel trial.

A further point could have been raised by the appellant to the effect that sentences could not be imposed so as to commence at the expiration of a sentence which he was then serving. The Court in the *Shepherd* case, above cited, on page 978 answers this question by saying that this contention is wholly without merit. Cumulative sentences are permissible under Federal practice, citing *Blitz v. United States,* 153 U. S. 308, 317, 14 S. Ct. 924, 38 L. Ed. 725; *Howard v. United States* (6 Cir.), 75 Fed. 986, 991, 21 C. C. A. 586, 34 L. R. A. 509; and sentences on convictions during imprisonment may be expressly made to commence at the end of the existing imprisonment (*Ponzi v. Fessenden,* 258 U. S. 254, 265, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879).

POINT II.

Appellant Was Not Denied the Right to Counsel as Guaranteed by the Sixth Amendment to the Constitution.

A. The Right to Have the Assistance of Counsel Is a Personal Right That Was Waived in This Case.

When a defendant is informed upon arraignment by the Court Clerk of his right to counsel at all stages of the proceedings, and he states in open court that he did not want the assistance of counsel but preferred to represent himself, such constitutes a waiver of his right to the assistance of counsel as was held in *Nivens v. Huspeth, Warden* (C. C. A. 10, 1942), 128 F. 2d 15.

Likewise, it was held in *Amrine v. Tines* (C. C. A. 10, 1942), 131 F. 2d 827, that the right to assistance of counsel is a "personal right" and may be waived, and if the accused is otherwise accorded a fair trial which embraces an opportunity to be heard after due notice, he cannot complain of the failure to have counsel for his defense.

In *Johnson v. Zerbst,* 304 U. S. 458, at 468, the United States Supreme Court said that where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to the assistance of counsel.

The *Johnson* case, above, was cited for the general rule by this Court in *Harpin v. Johnston, Warden* (C. C. A. 9,

1940), 109 F. 2d 434 at 435. In addition, it was pointed out that the determination of whether there had been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. It was there held that the record failed to show that defendant did not competently and intelligently waive his right to counsel, and that appellant failed to carry the burden resting upon him.

In the present case, it must be observed that appellant was competent enough to conduct his own trial *in propria persona* after counsel had been appointed by the Court for him, and relieved at the request of the appellant. It is self-evident that he has displayed an intelligent grasp of his situation by writing his own appellate brief which discloses a background of experience in court procedure. His conduct in open court refusing counsel, his failure to request appointment of another attorney after he disagreed with the first one appointed, were facts and circumstances all within the determination of the trial court as to whether appellant waived his right herein.

As this Court said in *O'Keith v. Johnston* (C. C. A. 9, 1944), 146 F. 2d 231 at 232, the

> "lower court was in the best position to judge whether appellant intelligently waived his right to counsel. If the court feels that he understands he is waiving a right, it is not a jurisdictional imperative that he be presently reminded of it. (Citing *Michener v. Johnston,* 9 Cir., 141 F. 2d 171, 174.) To inform him of a

right which he knew and intelligently waived would have been a useless act."

The Court further said that whereas the better practice (in a habeas corpus hearing) would be to record the fact of determination of proper waiver, still the failure to do so did not negative the fact that such a determination was made.

A waiver is ordinarily a relinquishment or abandonment of a known right or privilege. Waiver is a question of ultimate fact rather than of law. *Michener v. Johnston, supra.* That case was a habeas corpus proceeding following a plea of guilty, and the court did not fully advise the appellant of his rights to counsel. The cause was remanded because it was not clear whether the court below made a clear finding on waiver, or on what basis it may have been made. However, at page 175 this observation appears in the opinion:

> "At the hearing below the court had opportunity from personal observation of the petitioner to weigh his credibility, to gauge his intelligence, and to judge fairly the measure and extent of his understanding of his rights as gleaned from his prior experience as well as what was told him. We would be reluctant to disturb a clear finding of waiver had such a finding been made."

In the case of *O'Keith v. Johnston* (C. C. A. 9, 1942), 129 F. 2d 889 at 890, this Court said a waiver of counsel is usually to be implied from the appearance of an accused without counsel or his failure to request counsel.

That case was a habeas corpus proceeding after a plea of guilty, and the lower court had not informed appellant of his right to counsel. It was held that where the lower court found that he intelligently waived his right to counsel, it would have been a useless act to inform him of the existence of a right which he knew he had and which he thus had waived. Its performance was not required by the constitution, and its omission did not deprive the court of jurisdiction.

A fitting summary of the law as applied to the present case was made in *Scott v. Johnston,* 71 Fed. Supp. 117 at 121, where the District Court said:

> "It is recognized that under appropriate circumstances the constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant, citing *Carter v. People of State of Illinois,* 67 S. Ct. 216, 91 L. Ed. 172, 329 U. S. 173."

Furthermore, the right to assistance of counsel in a criminal case as guaranteed by the Sixth Amendment has reference to the court of first instance only, and does not relate to the right of appeal. *Thompson v. Johnston* (C. C. A. 9, 1947), 160 F. 2d 374.

Conclusion.

This is a case in which the evidence is abundantly sufficient to support the finding of the jury that the matter sent through the United States mails by appellant was obscene. The evidence is undisputed that appellant deposited such matter for delivery in the Post Office Establishment of the United States, and that appellant used various names other than his true name in connection with his business. The indictment was adequate and appellant had a fair trial. There was no reversible error committed by the Court in denying a continuance at the time of trial. The appellant clearly waived his personal right to counsel throughout the proceedings, and has no standing to complain that he was denied a speedy trial. There is no reason for setting aside the verdict, and no legal or sufficient cause for a new trial. Therefore, the judgment should be affirmed.

Respectfully submitted,

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